



Fairness & Privacy Complaints Handling

A consultation on procedures for the handling of
fairness and privacy complaints

Consultation

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Section 1

Summary

- 1.1 Ofcom is the regulator for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services. Ofcom's statutory duties are derived from the Communications Act 2003 ("the Act").
- 1.2 Under the relevant legislation Ofcom has a duty to apply adequate protection, for those affected by programmes in television and radio services, against unfairness or the unwarranted infringement of privacy. In particular, it has a specific duty to consider and adjudicate on complaints raised in relation to these matters.
- 1.3 The Act requires that Ofcom establish procedures for the consideration and adjudication of fairness and privacy complaints. It is for Ofcom to determine, subject to certain matters expressly required by statute, the appropriate structure and conditions of any complaints handling procedures.
- 1.4 Under the Act such procedures should be consistent with Ofcom's regulatory principles and be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome. In the interests of the parties, Ofcom considers that they should also be quick and effective, easy to use and understand and in keeping with natural justice.
- 1.5 Such procedures need to be consistent with relevant legislation, including the following:
 - The Act
 - The Broadcasting Act 1996, as amended by the Act ("the BA")
 - Television Without Frontiers Directive 89/EEC, as amended by 97/36/EC ("TWF")
 - The Human Rights Act 1998 ("the HRA")
- 1.6 A summary of the legal provisions relevant to this consultation is set out in Annex 4 of this document.
- 1.7 The purpose of this consultation is to seek views, and understand stakeholder opinions, on the possible structure of fairness and privacy complaints handling procedures.
- 1.8 This consultation document sets out relevant issues and proposed changes to the current procedures for handling fairness and privacy complaints. Draft proposed procedures are set out under Section 3 'Consultation Questions and Proposed Draft Guidelines'.
- 1.9 In particular, Ofcom would like responses to this consultation from:
 - interested members of the public;
 - broadcasters regulated by Ofcom;
 - companies, professional organisations, associations, bodies, groups or individuals who represent the interests of those who may be affected by the procedures;

- companies, professional organisations, associations, bodies, or individuals who work in the broadcasting sector or related sectors;
- other regulators.

Section 2

Background

- 2.1 Under the relevant legislation Ofcom has a duty to apply adequate protection, for those affected by programmes in television and radio services, against unfairness or the unwarranted infringement of privacy.
- 2.2 The Act requires that Ofcom establish procedures for the consideration and adjudication of fairness and privacy complaints. It is for Ofcom to determine, subject to certain matters expressly required by statute, the appropriate structure and conditions of any complaints handling procedures.
- 2.3 Under the Act such procedures should be consistent with Ofcom's regulatory principles and be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome. In the interests of the parties, Ofcom considers that they should also be quick and effective, easy to use and understand and in keeping with natural justice.
- 2.4 The current procedures for the handling of fairness and privacy complaints were adopted in March 2004 on an interim basis, following a short consultation. This was on the understanding that Ofcom would return to the matter and conduct a full consultation at a later stage having had the benefit of experiencing how the procedures work in practice.

Section 3

Consultation Questions and Draft Proposed Guidelines

- 3.1 We would welcome your comments on the draft proposed guidelines for the handling of fairness and privacy complaints below. In particular, any suggested amendments to the wording would be welcome. We would also welcome responses to the following questions:

Q1. Should complaints always be in writing and on a standard form? (Provision will be made for anyone who is unable to submit their complaint in this format)

Q2. Should Ofcom be able to seek to clarify the terms of a complaint where it is unclear?

Q3. Should Ofcom include a provision in its new guidelines to provide parties to a complaint with copies of entertainment decisions?

Q4. Should Ofcom incorporate a mechanism for appropriate resolution of complaints? How should this operate?

Q5. Should Ofcom limit the written stages of the complaints consideration process to a maximum of two exchanges of written submissions (ie. two rounds) – unless there are exceptional circumstances?

Q6. Should Ofcom consider late material whether in writing or at a hearing? Should Ofcom publish criteria for the admission of such material (and if so, what?) or should the decision be a matter for Ofcom's discretion?

Q7. In what circumstances should Ofcom hold hearings? Should Ofcom publish criteria for holding hearings or should the decision be a matter for Ofcom's discretion?

Q8. Should Ofcom retain a mechanism for reviewing decisions of the Executive? What should the possible grounds for a review be?

Q9. In what circumstances should Ofcom direct the broadcast or publication of a summary of its findings?

Q10. In what circumstances should Ofcom consider applying a statutory sanction?

Draft proposed guidelines for the handling of fairness and privacy complaints

Introduction

- 3.2 This document outlines the procedures that Ofcom will normally follow when handling fairness and privacy complaints about programmes (“programme” includes an advertisement, teletext and any item included in television and radio services). Separate guidelines exist for the handling of standards complaints. These guidelines have been prepared in the light of the Human Rights Act 1998 and the European Convention on Human Rights (which refers to the right to a fair trial) and are effective from [date to be confirmed following completion of consultation]. The Communications Act 2003 requires Ofcom to consider, and where appropriate adjudicate, on fairness complaints.

Making complaints

- 3.3 Due to their complexity, Ofcom will normally only consider fairness and privacy complaints that are in writing and on the appropriate form. The details of the complainant and complaint (including time; channel; programme; nature of the complaint etc) will be needed. Each complaint will be logged and the complainant will be given a reference number.
- 3.4 Normally, the complaint should be made by “the person affected” by the programme (see text box below). For the purposes of these guidelines “a person” means an individual, association or corporate body. However, another person can make the complaint on behalf of the person affected, provided he/she is authorised to do so. In exceptional circumstances, a member of the family of the person affected or someone closely connected to that person may make a complaint on their behalf if the person affected is unable to do so, for example, because they are under the age of 16.

The Person Affected

“The person affected” is a person who:

- a) was a participant in the programme and may have been the subject of unfair treatment; or
- b) whether a participant or not, had a sufficiently direct interest in the subject-matter of that unfair treatment; and/or,
- c) was a person whose privacy may have been unwarrantably infringed in or in the making of a programme.

- 3.5 Ofcom will normally only consider fairness and privacy complaints that are made within a reasonable time. In most cases, because of licence and other restrictions on the period for which broadcasters have to retain recordings of their output, Ofcom will normally only consider radio complaints up to 42 days after the relevant broadcast,

television complaints up to 90 days after the relevant broadcast except satellite and cable which can only be considered up to 60 days after the relevant broadcast. In any event it is advised that complaints should be submitted as soon as possible after the most recent broadcast of the programme.

Complaint assessment

- 3.6 The first step Ofcom takes upon receipt of a complaint is to decide whether or not to take the complaint forward for consideration. This is normally made by the appropriate member(s) of the Ofcom Executive (normally the Programme Executive) and is called the “entertainment” decision. Parties to a complaint will be provided with a copy of Ofcom’s entertainment decision.
- 3.7 The legislation sets out a number of criteria that must be satisfied before a fairness and privacy complaint can be entertained by Ofcom. The criteria are detailed below:
- the complainant must be “the person affected” (see text box above);
 - the matter(s) complained of must not be the subject of legal proceedings in the UK or be more appropriately resolved by legal proceedings in the UK;
 - the complaint must not be frivolous; and,
 - it must not be inappropriate to entertain or proceed with consideration of the complaint for any other reason.
- 3.8 Not all complaints received will fall into Ofcom’s fairness and privacy remit. If the complaint falls outside that remit, then the complainant will be notified and provided with a copy of Ofcom’s entertainment decision which explains why the complaint will not be taken forward for consideration (please also see “Reviewing a decision” below). However, where the complaint raises other matters which are within Ofcom’s remit, the complaint will be passed to an appropriate member of the Executive to investigate (if it is a standards matter the Guidelines for the Handling of Standards Complaints and Cases will apply).
- 3.9 In appropriate circumstances (for example, more complex cases), the Executive may refer the complaint to the Fairness Committee for a decision whether or not to entertain the complaint. The Fairness Committee is Ofcom’s most senior decision making body in respect of fairness and privacy complaints. (See text box following paragraph 14 for information on the Fairness Committee.)

Entertained complaints

- 3.10 It is essential to the integrity of the process and Ofcom’s ability to adjudicate fairly that the parties concerned, both complainant and broadcaster, abide by our published rules and procedures. For example, parties to a complaint should treat all correspondence, documents and other material concerning the complaint as confidential, except material already in the public domain. Failure to abide by Ofcom’s published rules and procedures by complainants may result in Ofcom terminating its consideration of the complaint. Failure by broadcasters may result in Ofcom taking appropriate regulatory action.
- 3.11 If the complaint is ‘entertained’, the broadcaster will be sent a copy of the entertainment decision, the complaint and any supporting documentation which relates directly to the complaint.

- 3.12 The broadcaster will be asked to provide, normally within ten working days, either a proposal for 'appropriate resolution' (see text box below) or a statement in response (where a fairness or privacy case is particularly detailed or complex and the broadcaster is to submit a statement in response, rather than propose redress, a longer period may be necessary).

Appropriate resolution

At this stage, the complaint may be resolved without the need for adjudication by Ofcom. This is provided the complainant is willing to consider an immediate proposal for redress and the broadcaster considers that it is appropriate to propose a remedy or redress. Examples of such redress might include, but are not restricted to, the editing of a programme for future broadcasts or an undertaking not to repeat the programme, an apology or correction in writing and/or broadcast.

If the redress that is proposed is accepted by the complainant then Ofcom will discontinue consideration of the complaint.

If redress that is proposed is not accepted by the complainant, but is nonetheless considered reasonable by Ofcom, then Ofcom will normally discontinue consideration of the complaint.

If redress is proposed that is neither accepted by the complainant nor considered reasonable by Ofcom then Ofcom will proceed with consideration of the complaint as set out in these guidelines.

On receipt of the broadcaster's statement, Ofcom will copy it to the complainant. Ofcom will then consider whether a second round of statements and/or specific information is required. A week will normally be allowed for a response, though the complainant/broadcaster will be given longer if necessary. After this point, Ofcom will only allow further written submissions in circumstances which it judges to be exceptional. Subject to legal privilege, the complainant and the broadcaster will see all the documentation relied on by the parties in relation to the matters in issue and which the Executive or Fairness Committee will consider, or have sight of, as part of its adjudication.

Executive Fairness Group adjudications

- 3.13 If Ofcom considers the case straightforward, then it is passed to the Executive Fairness Group (see text box below for information on the Executive Fairness Group). The Executive Fairness Group will make a provisional decision (i.e. upheld, not upheld, upheld in part), with reasons, to both parties. If within ten working days of Ofcom's notification to the parties of the provisional decision neither party requests a review of that decision (see 'Reviewing a decision' below), the provisional decision becomes final.

Executive Fairness Group

The Ofcom Board has given the Executive Fairness Group authority to discharge functions in relation to fairness and privacy complaints.

The duties of the Executive Fairness Group are:

- a) considering and adjudicating on fairness and privacy complaints referred to it by the Executive;
- b) settling and approving adjudications of complaints it has adjudicated upon; and,
- c) deciding whether to make directions for publication of summaries of fairness and privacy complaints and Ofcom's findings where it has itself adjudicated.

All decisions of the Executive Fairness Group are subject to internal review and, where appropriate, reconsideration by the Fairness Committee.

The Group shall normally consist of three members, all of whom shall be drawn from the Executive. The Group shall normally consist of two senior members of the Executive and the Programme Executive with responsibility for managing the case. The Group may be attended by a legal adviser, and, as appropriate, any other Ofcom colleagues.

For a fuller explanation of the Executive Fairness Group's role please refer to Ofcom's website

Fairness Committee adjudications

- 3.14 The Fairness Committee will consider cases referred to it by the Executive for adjudication, for example, because they are complex. (See text box below for information on the Fairness Committee).

The Fairness Committee

The Ofcom Board has delegated the discharge of Ofcom's functions in relation to fairness and privacy complaints to a committee known as the Fairness Committee. The Committee shall consist of a maximum of four members, all of whom shall be drawn from the Content Board.

All decisions of the Fairness Committee are final and not subject to internal review, reconsideration or appeal.

The duties of the Fairness Committee include:

- a) deciding whether to entertain or proceed with the consideration of fairness and privacy complaints where such decisions have been referred to it by the Executive as appropriate;
- b) considering and adjudicating on fairness and privacy complaints referred to it by the Executive as appropriate (for example, due to their complexity); and,

c) reviewing entertainment decisions or provisional adjudications where either one or both of the parties have made out a case for the Executive's decision to be reviewed.

For a fuller explanation of the Fairness Committee's role please refer to Ofcom's website.

- 3.15 When necessary (for instance, in the case of conflicting evidence) the Fairness Committee may decide to hold a hearing to which the parties will be invited to make oral representations. Normally three weeks notice of the hearing date will be given to the parties. If appropriate, hearings may take place in Scotland, Wales or Northern Ireland as well as in London.
- 3.16 Hearings are held in private. A representative from Ofcom will make notes, but the hearings will not normally be recorded. Each of the parties may bring to the hearing any other person (normally up to a maximum of three other people). Their names, connection to the case and a description of the role they intend to play at the hearing, should be given to Ofcom at least seven working days before the hearing.
- 3.17 The procedure at the hearing will be at the discretion of the chair, but will normally be as follows:
- the chair explains the proceedings;
 - the complainant briefly summarises his/her case;
 - the broadcaster briefly answers the case;
 - questions may be put on behalf of Ofcom to the broadcaster and/or
 - the complainant;
 - at the chair's discretion the two parties may ask each other questions;
 - the broadcaster then makes a brief final statement; and,
 - the complainant then concludes with a brief final statement.
- 3.18 New material is not normally accepted at the hearing.
- 3.19 The Fairness Committee will decide if the complaint is upheld, upheld in part or not upheld. The decision of the Fairness Committee will be final.

Adjudications generally (Fairness Committee and Executive Fairness Group)

- 3.20 Ofcom will publish on its website a copy of its adjudication on each complaint. If a complaint is upheld in whole or in part, then Ofcom will also include a summary of the adjudication in its Programme Complaints Bulletin and may also direct the broadcaster to transmit and/or publish a summary of its adjudication.
- 3.21 Prior to publication, both parties will have the opportunity to comment on the summary of the adjudication and on factual errors in the adjudication itself.

Sanctions

- 3.22 If Ofcom considers there has been a serious breach of the Fairness and Privacy sections of the Broadcasting Code that warrants consideration of a statutory sanction it will refer the case back to the Executive to investigate whether a serious Code

breach has occurred. The Outline Procedure for Statutory Sanctions in Content Cases will then apply.

Reviewing a decision

- 3.23 If the complainant or broadcaster is dissatisfied with a decision made by the Ofcom Executive (entertainment decision or provisional adjudication) then they may request a review within ten working days of notification of the decision. A review will normally only be granted if the dissatisfied party puts forward an arguable case that the decision is flawed on, for example, any of the following grounds:
- a material mistake of fact has been made in reaching the decision;
 - the decision is unlawful (Ofcom has acted outside its powers or otherwise applied the law wrongly, including the Human Rights Act 1998);
 - the decision includes insufficient reasoning (the reasons given for the decision are inadequate);
 - undue or insufficient weight has been given to a piece or pieces of evidence; and
 - there was a material failure to follow published guidelines or Ofcom has otherwise not conducted a fair process; and/or,
 - the decision is irrational or perverse (no rational person could have reached the decision).
- 3.24 The decision whether or not to grant a request for a review, will be taken by a more senior member of the Executive not previously involved in the complaint and will normally be made by reference only to the grounds for review put forward by the person who has requested it. Advice may be sought from an Ofcom lawyer not previously involved in the complaint. Any review granted will be undertaken by the Fairness Committee (all of whom will be Ofcom Content Board members). The Fairness Committee will normally only reconsider those elements of the decision under review, on the basis of the relevant grounds. There may be certain exceptional circumstances where the Executive refer other elements of the decision for review by the Fairness Committee. The decision of the Fairness Committee is final.

Section 4

Impact Assessment

- 4.1 Impact Assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making and are commonly used by other regulators. Section 7 of the Act, means that generally we have to carry out IAs where implementing proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities.
- 4.2 However, there are some circumstances, as a general rule, where an IA will not be required. For example, where Ofcom is publishing guidelines detailing how it will undertake investigations. In our view the draft proposed guidelines for the handling of fairness and privacy complaints do not constitute a major change of policy or an important proposal which would be likely to have a significant effect on our stakeholders, such as to require an IA. Also, we do not consider that the draft proposed guidelines will have any significant economic impact or effect on competition. In these circumstances, we believe that carrying out an IA would be disproportionate.
- 4.3 Nevertheless, when drafting the proposed guidelines we took into account racial equality, disability equality, gender equality and effects on Northern Ireland. We consider the draft proposed guidelines to be neutral in their consequences for different social groupings. This is because they have been drafted in a way that allows Ofcom significant flexibility to accommodate anyone whom Ofcom believes might otherwise be at a disadvantage.
- 4.4 If you have any comments on the likely impact of our draft proposed guidelines you should send them to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.

Section 5

Responses

5.1 In particular, Ofcom would like responses to this consultation from:

- interested members of the public;
- broadcasters regulated by Ofcom;
- companies, professional organisations, associations, bodies, groups or individuals who represent the interests of those who may be affected by the procedures;
- companies, professional organisations, associations, bodies, or individuals who work in the broadcasting sector or related sectors;
- other regulators.

Annex 1

Responding to this consultation

How to respond

A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 23 December 2005**.

A1.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

A1.3 Please can you send your response to first val.meadowcroft@ofcom.org.uk.

A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Val Meadowcroft

Floor 5
Content & Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3806

A1.5 Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Section 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you. We would welcome your comments on the draft proposed guidelines for the handling of fairness and privacy complaints at Section 3. In particular, any suggested amendments to the wording would be welcome

Further information

A1.7 If you have any queries or want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Tony Close on 020 7981 3847.

Confidentiality

A1.8 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

- A1.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.
- A1.10 Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

- A1.12 Following the end of the consultation period, Ofcom intends to publish a statement in early 2006.
- A1.13 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

- A1.14 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.
- A1.15 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.
- A1.16 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Fairness & Privacy Complaints Handling

To (Ofcom contact): Val Meadowcroft

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 4

Relevant Legislation

Communications Act 2003

s.3(2)(f) General duties of OFCOM

The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—

The application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—

- (i) unfair treatment in programmes included in such services; and
- (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

s.326 Duty to observe fairness code

The regulatory regime for every programme service licensed by a Broadcasting Act licence includes the conditions that OFCOM consider appropriate for securing observance—

- (a) in connection with the provision of that service, and
 - (b) in relation to the programmes included in that service,
- of the code for the time being in force under section 107 of the 1996 Act (the fairness code).

Broadcasting Act 1996 (as amended)

s.107(1) Preparation by [OFCOM] of code relating to avoidance of unjust or unfair treatment or interference with privacy

It shall be the duty of [OFCOM] to draw up, and from time to time review, a code giving guidance as to principles to be observed, and practices to be followed, in connection with the avoidance of—

- (a) unjust or unfair treatment in programmes to which this section applies, or
- (b) unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.

s.110 General functions of [OFCOM] in relation to complaints

Subject to the provisions of this Part, it shall be the duty of [OFCOM] to consider and adjudicate on complaints which are made to them in accordance with sections 111 and 114 and relate—

- (a) to unjust or unfair treatment in programmes to which section 107 applies, or
- (b) to unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.

(3) In exercising their functions under subsection (1), [OFCOM] shall take into account any relevant provisions of the code maintained by them under section 107. . .

(4) In this Part—

“a fairness complaint” means a complaint to [OFCOM] in respect of any of the matters referred to in subsection (1)(a) and (b),

s.111 Complaints of unfair treatment etc

(1) A fairness complaint may be made by an individual or by a body of persons, whether incorporated or not, but, subject to subsection (2), shall not be entertained by [OFCOM] unless made by the person affected or by a person authorised by him to make the complaint for him.

(2) Where the person affected is an individual who has died, a fairness complaint may be made by his personal representative or by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he was at his death a member, or in any other way).

(3) Where the person affected is an individual who is for any reason both unable to make a complaint himself and unable to authorise another person to do so for him, a fairness complaint may be made by a member of the family of the person affected, or by some other person or body closely connected with him (whether as his employer, or as a body of which he is a member, or in any other way).

(4) [OFCOM] shall not entertain, or proceed with the consideration of, a fairness complaint if it appears to them that the complaint relates to the broadcasting of the relevant programme, or to its inclusion in a licensed service, on an occasion more than five years after the death of the person affected, unless it appears to them that in the particular circumstances it is appropriate to do so.

(5) [OFCOM] may refuse to entertain a fairness complaint if it appears to them not to have been made within a reasonable time after the last occasion on which the relevant programme was broadcast or, as the case may be, included in a licensed service.

(6) Where, in the case of a fairness complaint, the relevant programme was broadcast or included in a licensed service after the death of the person affected, subsection (5) shall apply as if at the end there were added “within five years (or such longer period as may be allowed by [OFCOM] in the particular case under subsection (4)) after the death of the person affected”.

(7) [OFCOM] may refuse to entertain—

(a) a fairness complaint which is a complaint of unjust or unfair treatment if the person named as the person affected was not himself the subject of the treatment complained of and it appears to [OFCOM] that he did not have a sufficiently direct interest in the subject-matter of that treatment to justify the making of a complaint with him as the person affected,

or

b) a complaint made under subsection (2) or (3) by a person other than the person affected or a person authorised by him, if it appears to [OFCOM] that the complainant's connection with the person affected is not sufficiently close to justify the making of the complaint by him.

s.114 Supplementary provisions as to making of complaints of either kind

(1) A fairness complaint . . . must be in writing, or in such other form as [OFCOM] may allow, and must give particulars of the matters complained of.

(2) [OFCOM] shall not entertain, or proceed with the consideration of, a fairness complaint ...if it appears to them—

(a) that the matter complained of is the subject of proceedings in a court of law in the United Kingdom, or

(b) that the matter complained of is a matter in respect of which the complainant or . . . the person affected has a remedy by way of proceedings in a court of law in the United Kingdom, and that in the particular circumstances it is not appropriate for [OFCOM] to consider a complaint about it, or

(c) that the complaint is frivolous, or

(d) that for any other reason it is inappropriate for them to entertain, or proceed with the consideration of, the complaint.

s.115 Consideration of fairness complaints

(1) Subject to the provisions of sections 111 and 114, every fairness complaint made to [OFCOM] shall be considered by them either at a hearing or, if they think fit, without a hearing.

(2) Hearings under this section shall be held in private; and where such a hearing is held in respect of a fairness complaint, each of the following persons shall be given an opportunity to attend and be heard, namely—

(a) the complainant,

(b) the relevant person,

(c) ...

(d) any person not falling within any of paragraphs (a) [or (b)] who appears to [OFCOM] to have been responsible for the making or provision of that programme, and

(e) any other person who [OFCOM] consider might be able to assist at the hearing.

(3) Before [OFCOM] proceed to consider a fairness complaint they shall send a copy of it—

(a) to the relevant person, . . .

(b) ...

(4) Where the relevant person receives from [OFCOM] a copy of the complaint, it shall be the duty of that person, if so required by [OFCOM]—

(a) to provide [OFCOM] with a visual or sound recording of the relevant programme or of any specified part of it, if and so far as the relevant person has such a recording in his possession;

(b) to make suitable arrangements for enabling the complainant to view or hear the relevant programme, or any specified part of it, if and so far as the relevant person has in his possession a visual or sound recording of it;

(c) to provide [OFCOM] and the complainant with a transcript of so much of the relevant programme, or of any specified part of it, as consisted of speech, if and so far as the relevant person is able to do so;

(d) to provide [OFCOM] and the complainant with copies of any documents in the possession of the relevant person, being the originals or copies of any correspondence between that person and the person affected or the complainant in connection with the complaint;

[(da) to provide OFCOM with such other things appearing to OFCOM to be relevant to their consideration of the complaint, and to be in the possession of the relevant person, as may be specified or described by OFCOM;]

(e) to furnish to [OFCOM] and the complainant a written statement in answer to the complaint.

(5) Where the relevant person receives from [OFCOM] a copy of a fairness complaint, it shall also be the duty of that person, if so required by [OFCOM]—

(a) where the relevant person is a broadcasting body, to arrange for one or more of the governors, members or employees of the body to attend [OFCOM] and assist them in their consideration of the complaint, or

(b) where the relevant person is a body other than a broadcasting body, to arrange for one or more of the following, namely—

(i) the persons who take part in the management or control of the body, or

(ii) the employees of the body,

to attend [OFCOM] and assist them in their consideration of the complaint, or

(c) where the relevant person is an individual, to attend, or to arrange for one or more of his employees to attend, [OFCOM] and assist them in their consideration of the complaint.

(6) Where the relevant person receives from [OFCOM] a copy of a fairness complaint and, in connection with the complaint, [OFCOM] make to any other person a request to which this subsection applies, it shall be the duty of the relevant person to take such steps as he reasonably can to ensure that the request is complied with.

(7) Subsection (6) applies to the following requests by [OFCOM] to any such other person as is there mentioned, namely—

(a) a request to make suitable arrangements for enabling the complainant and any member or employee of [OFCOM] to view or hear the relevant programme, or any specified part of it, if and so far as the person requested has in his possession a visual or sound recording of it;

(b) a request to provide [OFCOM] and the complainant with a transcript of so much of the relevant programme, or of any specified part of it, as consisted of speech, if and so far as the person requested is able to do so;

(c) a request to provide [OFCOM] and the complainant with copies of any documents in the possession of the person requested, being the originals or copies of any correspondence between that person and the person affected or the complainant in connection with the complaint;

[(ca) a request to provide OFCOM with such other things appearing to OFCOM to be relevant to their consideration of the complaint, and to be in the possession of the person requested, as may be specified or described by OFCOM;]

(d) a request to furnish to [OFCOM] and the complainant a written statement in answer to the complaint;

(e) a request to attend, or (where the person requested is not an individual) to arrange for a representative to attend, [OFCOM] and assist them in their consideration of the complaint.

(8) Where [OFCOM] have adjudicated on a fairness complaint, [OFCOM shall send a copy of] their findings to the complainant.

(9) In this section “the relevant person” means—

(a) in a case where the relevant programme was broadcast by a broadcasting body, that body, and

(b) in a case where the relevant programme was included in a licensed service, the licence holder providing the service.

s.117 Duty to retain recordings

For the purposes of [section 115] of this Act and of section 167 of the 1990 Act (power to make copies of recordings in connection with certain offences) it shall be the duty of each broadcasting body to retain a recording of every television or sound programme which is broadcast by that body—

(a) where it is of a television programme, during the period of 90 days beginning with the day of the broadcast, and

(b) where it is of a sound programme, during the period of 42 days beginning with the day of the broadcast.

s.118 Power to pay allowances to persons attending hearings

[OFCOM] may, if they think fit, make to any person who attends them in connection with a fairness complaint . . . such payments as they think fit by way of travelling allowance or subsistence allowance where expenditure on travelling or, as the case may be, on subsistence is necessarily incurred by him for the purpose of enabling him so to attend.

s.119 Publication of [OFCOM's] findings

[(1) Where OFCOM have considered and adjudicated upon a fairness complaint, they may direct the relevant person to publish the matters mentioned in subsection (3) in such manner, and within such period, as may be specified in the directions.]

(3) Those matters are—

(a) a summary of the complaint;

(b) [OFCOM's] findings on the complaint or a summary of them;

(c) ...

(4) References in [subsection (1)] to the publication of any matter are references to the publication of that matter without its being accompanied by any observations made by a person other than [OFCOM] and relating to the complaint.

(5) The form and content of any such summary as is mentioned in subsection [(3)(a) or (b)] shall be such as may be approved by [OFCOM].

(6) A [relevant person] shall comply with any directions given to [him] under this section.

[(7) The regulatory regime for every licensed service includes the conditions that OFCOM consider appropriate for securing that the licence holder complies with every direction given to him under this section.

(7A) Section 263 of the Communications Act 2003 applies in relation to conditions included by virtue of subsection (7) in the regulatory regime for a licensed service as it applies in relation to conditions which are so included by virtue of a provision of Chapter 4 of Part 3 of that Act.

(7B) It is hereby declared that, where—

(a) OFCOM exercise their powers under this Part to adjudicate upon a fairness complaint or to give a direction under subsection (1), and

(b) it appears to them that the matters to which the complaint in question relates consist in or include a contravention of the conditions of the licence for a licensed service,

the exercise by OFCOM of their powers under this Part is not to preclude the exercise by them of their powers under any other enactment in respect of the contravention.

(7C) Where OFCOM are proposing to exercise any of their powers in respect of a contravention of a licence condition in a case in which the contravention relates to matters that have been the subject-matter of a fairness complaint—

(a) OFCOM may have regard, in the exercise of those powers, to any matters considered or steps taken by them for the purpose of adjudicating upon that complaint and to any direction given by them under this section; but

(b) steps taken for the purposes of this Part do not satisfy a requirement to give the licence holder in relation to whom those powers are to be exercised a reasonable opportunity, before they are exercised, of making representations to OFCOM.]

(8) [OFCOM] shall publish, monthly or at such other intervals as they think fit and in such manner as they think fit, reports each containing, as regards every fairness complaint . . . which falls within this subsection and has been dealt with by them in the period covered by the report—

(a) a summary of the complaint and the action taken by them on it,

(b) where they have adjudicated on it, a summary of—

(i) their findings,

(ii) any direction given under subsection (1), or other action taken by them, in relation to the complaint, and

(c) where a direction has been given under subsection (1) in relation to the complaint, a summary of any action taken by a broadcasting body. . . or the holder of a licence to provide a licensed service in pursuance of the direction.

(9) A fairness complaint . . . made to [OFCOM] falls within subsection (8) unless it is one which under section 111(1), (4) or (5). . . or 114(2) they have refused to entertain.

(10) [OFCOM] may, if they think fit, omit from any summary which is included in a report under subsection (8) and relates to a fairness complaint any information which could lead to the disclosure of the identity of any person connected with the complaint in question other than [a relevant person].

(11) The references in subsections (3)(b) and (8)(b) to [OFCOM's] findings on a complaint shall be construed, in relation to a fairness complaint which has been considered by them in two or more parts, as references to their findings on each part of the complaint.

[(11A) In this section "relevant person" means—

(a) in a case where the relevant programme was broadcast by a broadcasting body, that body; and

(b) in a case where the relevant programme was included in a licensed service, the licence holder providing that service.]

s.120 Reports on action taken voluntarily in response to findings on complaints

(1) This section applies where [OFCOM] have given a direction under section 119(1) in relation to a fairness complaint ...

[(2) Where the relevant programme was included in a licensed service, the licence holder shall send to OFCOM a report of any supplementary action taken by him or by any other person responsible for the making or provision of the relevant programme.]

(3) Where the relevant programme was broadcast by a broadcasting body, that body shall send to [OFCOM] a report of any supplementary action taken by—

(a) the broadcasting body, or

(b) any other person appearing to that body to be responsible for the making or provision of the relevant programme.

(4) [OFCOM] may include, in any report under section 119(8), a summary of any report received by them under subsection (2) or (3) in relation to the complaint.

(5) In this section "supplementary action", in relation to a complaint, means action which, although not taken in pursuance of a direction under section 119(1), is taken in consequence of the findings of [OFCOM] on the complaint.

s.121 Certain statements etc protected by qualified privilege for purposes of defamation

(1) For the purposes of the law relating to defamation—

(a) publication of any statement in the course of the consideration by [OFCOM] of, and their adjudication on, a fairness complaint,

(b) publication by [OFCOM] of directions under section 119(1) relating to a fairness complaint, or

(c) publication of a report of [OFCOM], so far as the report relates to fairness complaints, is privileged unless the publication is shown to be made with malice.

(2) Nothing in subsection (1) shall be construed as limiting any privilege subsisting apart from that subsection.

s.130 Interpretation of Part V

(1) In this Part (unless the context otherwise requires)—

“broadcasting body” means the BBC or the Welsh Authority;

“fairness complaint” has the meaning given by section 110(4);

“licensed service” means. . .—

(a) any television programme service (within the meaning of Part I of the 1990 Act) which is licensed under that Part,

[(aa) the public teletext service,

(b) any relevant independent radio service (within the meaning of section 85 of the 1990 Act),

(c) any additional service (within the meaning of Part 1 of the 1990 Act) which is licensed under that Part,]

(d) any digital programme service (within the meaning of Part I of this Act) which is licensed under that Part,

(e) any qualifying service (within the meaning of Part I of this Act) provided by a person other than the Welsh Authority,

(f) any digital sound programme service (within the meaning of Part II of this Act) which is licensed under that Part,

(g) any simulcast radio service (within the meaning of Part II of this Act), and

(h) any digital additional service (within the meaning of Part I or II of this Act) which is licensed under that Part;

“participant”, in relation to a programme, means a person who appeared, or whose voice was heard, in the programme;

“the person affected”—

(a) in relation to any such unjust or unfair treatment as is mentioned in section 110(1), means a participant in the programme in question who was the subject of that treatment or a person who, whether such a participant or not, had a direct interest in the subject-matter of that treatment, and

(b) in relation to any such unwarranted infringement of privacy as is so mentioned, means a person whose privacy was infringed;

“programme” includes an advertisement and a teletext transmission and, in relation to a service, includes any item included in that service;

“the relevant programme”, in relation to a complaint, means the programme to which the complaint relates;

“unjust or unfair treatment” includes treatment which is unjust or unfair because of the way in which material included in a programme has been selected or arranged.

(2) In this Part—

(a) any reference to programmes to which section 107 applies shall be construed in accordance with section 107(5), . . .

Television without Frontiers Directive (89/552/EEC), as amended by (97/36/EC)

Article 23

1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.

2. A right to reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.

3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons residence or established in other Member States.

4. An application for exercise of the right of a reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil law proceedings or would transgress standards of public decency.

5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

Human Rights Act 1998

s.3(1) Interpretation of legislation

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms are set out in Schedule 1)

Article 6

Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8

Right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.